

BOOK REVIEWS

SPENDTHRIFT TRUSTS. By Erwin N. Griswold. Matthew Bender & Co., Albany, 1936. Pp. lxxv, 551. Price: \$8.50.

In the preface to the first edition of his famous treatise on the Rule against Perpetuities, Professor Gray said: "I have long thought that in the present state of legal learning a chief need is for books on special topics, chosen with a view, not to their utility as the subjects of convenient manuals, but to their place and importance in the general system of the law. . . . Such a book should deal with the whole of its subject, its history, its relation to other parts of the law, its present condition, the general principles which have been evolved and the errors which have been eliminated in its development, and the defects which still mar its logical symmetry, or, what is of vastly greater moment, lessen its value as a guide to conduct."

This is what Professor Griswold has done with that part of the subject of Trusts which involves restraints on the alienation of the interests of beneficiaries, whether imposed by the terms of the trust or by statute, and other related questions.

Forty years ago Professor Gray wrote another book, a book on Restraints on Alienation, in which he said that his task was to show that spendthrift trusts have no place in the system of the common law. He said that he did not deny that they might be in entire harmony with the social code of the next century. Certainly in the twentieth century spendthrift trusts have been accepted in the great majority of the American states, and a large body of law has grown up with respect to them. It is this body of law with which Professor Griswold deals. The question with which the courts are now confronted is in most states not whether a restraint on the alienation of the interest of the beneficiary of a trust is valid but how far such a restraint is valid, and as to the results which follow from allowing such restraints. How far does the existence of such a restraint prevent the termination of the trust? How far does it enable the beneficiary to hold the trustee liable for deviating from the terms of the trust when the beneficiary has requested or consented to such deviation? Can the beneficiary of a spendthrift trust refuse to support his wife and children, refuse to perform his obligations to the state? Can the settlor reserve for himself an interest under the trust and put it beyond the reach of his creditors, and who is the settlor within the meaning of this question? Is a restraint on alienation valid where the beneficiary has an interest in fee simple or a corresponding interest in personalty? What about the interest of the beneficiary of an insurance policy? What is the relation between restraints on alienation and the rule against perpetuities?

All these questions and many others Professor Griswold has dealt with in detail, including a discussion of all the relevant statutory and case material.

No lawyer who is presented with a problem involving the effect of a provision in the trust instrument restraining the alienation of the interest of the beneficiary, or the effect of the conferring of discretion upon the trustee as to the payment or application of the income or principal under a trust, or involving a provision that trust property is to be applied to the support of the beneficiary, can afford not to consult this book. When it is borne in mind that in many states, as in New York, every trust in which the income is payable to a beneficiary for life is a spendthrift trust, one realizes the great practical importance of the matter here treated.

In reading this book one cannot fail to be impressed not only by the great diligence of the author but also by his firm grasp of the essential elements in the problems with which he deals and the intellectual vigor with which he treats them and the clarity of his style. He gives us here the historical development of the subject, its relation to other parts of the law, its present condition, and a discriminating presentation of the great problems of social and economic policy which underlie the subject.

Austin Wakeman Scott.†

A REAL NEW DEAL. By Charles E. Carpenter. Published by the author, Los Angeles, 1936. Pp. 137.

In a small volume Professor Carpenter has endeavored to present an economic philosophy, an exposition of the major defects of the operations of our present national economy, a full-grown "plan" to remedy those defects, and recommendations for material changes in the political and legal organization of the federal government. Quite naturally, one cannot expect to find great detail in the treatment of such a range of material within the narrow limits of a book which can be read (though perhaps not thoroughly understood) in a few hours. Yet the outline presented is lucid and thought-provoking.

The author's basic premise is that the present economic system of private enterprise stimulated by private profit is undoubtedly ailing, but is not incurably diseased. He rejects all schemes of government ownership of the means of production, and other socialistic proposals, as inferior to a private profit system drastically altered to eliminate what he considers the principal defects of its present operation. In brief, these defects are the tremendous inequality of wealth and income throughout the population, the existence of large fixed costs in business enterprises, and various features of the modern corporate set-up. The great disparity between wealth and income results in an excess of capital available for expansion of the means of production and a relative contraction of purchasing power. This process, by which the expansion of productive capacity outstrips the power of consumers to purchase, is, in Mr. Carpenter's opinion, an important cause of depressions—a more material factor than uncontrolled fluctuations in the supply of currency and credit. Fixed costs prevent the entrepreneur from contracting the expenses of his business when profits begin to fall, with the result that bankruptcy may overtake a business which is really economically sound. The author's complaint against the modern corporate device lies in the opportunity afforded for irresponsible control of business wealth by persons who do not have any substantial interest in the financial success of the enterprise which they have the power to direct.

The essence of the plan to correct these defects is: (1) Division of profits into three parts, one to go to workers in the form of increased wages, one to consumers in the form of reduced prices or improved goods, and the remainder to shareholders and management as dividends; (2) Elimination of major fixed charges by discarding the use of long-term corporate bonds and deriving all capital from the sale of stock, and by substituting income, inheritance, and gift taxes for most other forms of taxation; (3) Reformation of corporate organization by a simplified share structure, prohibition of interlocking directorates, maximum salaries for managers, a small guaranteed minimum dividend to shareholders, and representation on the board of directors by labor, government, and, where practical, consumers. The author suggests that the plan could be put

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into effect through a federal incorporation act requiring corporations organizing under it to embody in their articles of incorporation the elements of the various proposals. Such an incorporation statute, in Mr. Carpenter's opinion, could be enacted without constitutional amendment. Finally, a number of changes in the constitutional powers of the three divisions of the federal government are recommended. These include amendments to empower the President to require either house of Congress to stand for election if it opposes an administration measure, to have all appropriation bills originate with the President, and to curtail the power of the courts to nullify social legislation.

Professor Carpenter's economic proposals apparently deal only with changes to be effected in business carried on by corporations. The question naturally arises: what of non-corporate business? Is it safe to assume that even effective regulation of corporate business will transform the whole national economy sufficiently to bring about the socially beneficial results that Professor Carpenter visualizes? Take, for example, the proposal to distribute a share of profits to the consumer in the form of reduced prices. It is not difficult to see how consumers will benefit by such a procedure in businesses which deal directly with them, such as public utilities and railroads. But how will the plan work in most industrial fields where the producer reaches the consumer only through several middlemen? How can we be assured that a reduction of price by a manufacturer will not result in increased profits to wholesalers and retailers (most of whom may be small non-corporate enterprisers) rather than in lower ultimate prices to the consumer? Furthermore, in many industries even production is carried on by a large number of unincorporated businesses, instead of by a few large corporations. If the plan does not affect such industries, should not some additional provision be made in their case to assure a greater participation in the profits by labor and consumers? It would seem that a complete plan to achieve a wider distribution of purchasing power should include some method of increasing the share of these classes in industries which cannot be effectively reached by Professor Carpenter's other proposals. A consideration of the possible effectiveness of greater organization of labor might have been appropriate in this connection.

Issue might be taken with the author's opinion that his plan could be put into effect by a federal incorporation statute without constitutional amendment. It would seem to be a clear implication from such decisions as *McCulloch v. Maryland*¹ and *Luxton v. North River Bridge Co.*² that Congress has no power to incorporate companies except for purposes related to some express power granted to Congress by the Constitution. A general incorporation act would probably be held unconstitutional, at least as applied to many industries.

Viewed not as a presentation of a finished and polished plan thoroughly worked out in all its details, but as an expression of one man's ideas, derived from his own study and observation, Professor Carpenter's book is worthy of serious consideration. Many of the proposals which seem at first blush to be utterly "radical" and "impracticable" become on further reflection quite plausible. The distribution of profits to labor and consumer, as well as to the "owners" of business, is by no means a revolutionary suggestion; the idea has been put into effect, though on a much more limited scale than the author suggests.³

1. 4 Wheat. 316 (U. S. 1819).

2. 153 U. S. 525 (1894).

3. Mr. Carpenter himself points to the plan to distribute profits in the form of reduced prices to consumers of gas, put into operation in Boston at the instance of Justice Louis D. Brandeis when he was attorney for that city, and to the expressed policy of the Ford Motor Company to distribute profits to employees and consumers. P. 88.

The reviewer agrees with Professor Carpenter that one of the major faults of the present-day economic structure and a prime cause of recurring depressions is the maldistribution of purchasing power. Considered proposals directed toward the correction of this defect deserve the attention of students, as well as of legislators and statesmen sincerely bent upon setting our economic house in order.

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GUIDE TO FEDERAL APPELLATE PROCEDURE. By Nathan April. Prentice-Hall, Inc., New York, 1936. Pp. xxx, 522. Price: \$6.50.

In the foreword by Circuit Judge Manton, this work is described as "An epitome of the essentials of appellate procedural practice" and as "a meritorious attempt to simplify the more frequently invoked principles and rules of procedure."

The sheer impossibility of the latter is recognized by the author himself in his preface, where, in commenting on the cumbersome and archaic mechanics of a federal appeal, he points out the necessity of complete reorganization of federal appellate practice and constitutional amendment. How many of us, for example, have sought to appeal from an order entered by a district court in a bankruptcy matter, and have found ourselves impaled on the horns of that almost insoluble dilemma—do we enter the appeal in the district court or do we file a petition for leave to appeal in the circuit court of appeals? After careful reading of statutes and briefing of cases, we decide to do both and take two appeals from the same order, hoping that the circuit court will not throw out the appeal entirely, but will merely dismiss that one of our appeals which is incorrectly taken and decide the question on the merits on the other appeal.

Such a situation in state practice would be intolerable and the Bar would move actively for its immediate correction. But the federal practice is nationwide and any changes must come from Washington, rather than from the state capitol close at hand. The ice has been broken by the recent Act of Congress permitting the Supreme Court to adopt uniform rules of practice for cases in law and equity in the district court. It is anticipated that the proposed new rules will be made public this summer. Perhaps this will arouse the interest of the Bar to such an extent that immediate efforts will be made to reform the appellate procedure in its entirety.

Mr. April's book will be an excellent guide for those interested in appellate reform as well as appellate procedure. His analysis of the subject is orderly and careful; he begins with the jurisdiction of the appellate courts and a study of "what judgments and orders are reviewable," and then takes up the mechanics of the appeal—the method of taking and perfecting the appeal, supersedeas and the preparation of the record, briefs and arguments and the final disposition of the case.

There are, generally speaking, two types of text books on procedure—one which merely collects and classifies the statutes, rules and cases, a veritable digest in miniature—the other which points out to the practitioner the road to take on his procedural journey, and uses authorities merely to justify the instructions. Mr. April has used the latter method, sprinkling his text liberally with quotations from the Code and the various Rules. He has assembled an excellent set of nearly one hundred forms and provided an adequate index. The book will prove of real value to all practitioners who find themselves lost and bewildered in the jungle of a federal appeal.

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THE INTERSTATE COMMERCE COMMISSION (Vol. III-B). By I. L. Sharfman. The Commonwealth Fund, New York, 1936. Pp. xiv, 833. Price: \$5.00.

This volume is the fourth in a series of books on the Interstate Commerce Commission. In the three previous volumes the author has dealt with the legislative basis for the Commission's authority, the scope of its jurisdiction, the valuation project, and the control of organization and finance. The Commission's organization procedure is yet to be treated. The present volume is devoted to rate regulation, which is discussed under the two headings of the rate level and the rate structure.

In this volume Mr. Sharfman has shown that the problem of regulation involves more than giving adequate returns to the railways. It also involves the value of the service to those who use it. He has pointed out that an increase in rates is not the cure for the inadequacy of returns, although this is the only solution which the railways have been able to think of. In taking this position he accuses them of being "deficient in good judgment, if not in good faith." The kind of a solution desired by the railroads is inadequate, because it takes no cognizance of such factors as the ability of the shippers to ship and changes in the value of the dollar.

He also maintains that the railways cannot be given a fair return which is uniform and unchanging, determinate and arbitrary, the same in good and bad times and in favorable and unfavorable conditions. The railroads are a part of the rest of the economic life of the country. They do not enjoy a fictitious isolation. They must suffer from changing price levels the same as everyone else. He also contends that it is not right to increase freight rates to make up a deficiency in the passenger service, except as common costs are involved. The situation of different railways is different. Yet competitive conditions which are still tolerated, if not commended, require the same rates. Hence, it looks as though the solution of the problem demands one system of railways for the United States, or at least a rate level for the system as a whole. This was the theory of the Transportation Act of 1920 with its recapture provision, but the recapture provision has now been repealed. The railroads seemingly should have rates reduced when other parts of the economic order are depressed; but that might ruin the railroads, and if they are ruined, that might further destroy or further depress the businesses dependent upon the railroads. To reduce the rates according to the financial needs of a particular industry is no solution. It is nothing but shifting sand.

The difficulties of maintaining the right rate level, the author discloses, have not been as great as the difficulties incident to the rate structure. In determining specific freight charges, which in the final analysis must return reasonable compensation, the Commission has not emphasized cost standards, but rather the value of service. In that connection it has considered for the maximum rates, the profits of shippers, the movement of traffic, and the propriety of existing rates voluntarily maintained; for minimum rates, the value of the goods, cost of loading, risk of loss, special services, and car-mile and ton-mile costs have constituted the bases. The Commission has also considered competition with other carriers and the desirability of stability where there have been long established rates. Thus, the writer shows, it has stressed the elements of the problem most easily grasped. Departures from equality, even though needed, have been prevented rather than created. The value of the service has been emphasized in rates for different commodities, but not in rates for length of hauls. The cost of the service has not been emphasized because of the difficulty of ascertaining it, yet probably it is no more difficult than the difficulty of determining the value of the service. The rate structure has generally not been

allowed to be used to promote ulterior ends. There has been a failure to check competitive adjustments, but this has been due to the fact that there are many systems. The questions raised before the Commission have been too narrow. Railway tariffs are still enormously intricate.

Professor Sharfman in his set of books has given us an exhaustive and penetrating analysis of the work of the Interstate Commerce Commission. His work should be of abiding interest. It should be of especial assistance to teachers of economics and political science.

While law teachers and other lawyers will be impressed with the detail of Professor Sharfman's work, they will be surprised, if not disappointed, to find not treated some matters with which they are familiar, and which they would expect to find in his books. Because of their acquaintance with the common law on the subject of public callings and with the decisions of the United States Supreme Court, they will expect to find emphasis placed upon each one of the public calling duties of the railroads, that is, upon the duty to serve all shippers and passengers, the duty to serve with reasonably adequate facilities, the duty to serve without discrimination, and the duty to serve for reasonable compensation. The duty to serve without discrimination is treated but incidentally in Volume III-B, which we are now reviewing. The duty to serve all shippers and passengers and the duty to furnish reasonably adequate facilities are but briefly alluded to in Volume II. The duty to serve for reasonable compensation is the duty lying back of the discussion, in the present volume, of the rate level and the rate structure. But even in connection with this duty there are some omissions which may take the lawyer by surprise.

For one thing, a lawyer gets the impression that Mr. Sharfman has not given enough attention to the decisions of the United States Supreme Court. In this volume he cites about sixty Supreme Court decisions. These are comparatively few, but even these are treated so incidentally or are cited for such collateral points that their treatment is not impressive. The Commission has been hampered in its work, first, by the standard set up by Congress, and second, by the interpretations of the Supreme Court. Although perhaps the first is inevitable, many of the latter are regrettable, and they therefore invite exhaustive consideration.

For another thing, the reviewer gets the impression that Mr. Sharfman has not paid enough attention to the rate of return. He has given us an extended discussion of the rate base, but practically nothing on the subject of the rate of return. He has criticized the Commission for its neglect of original costs and also for not requiring a separate value for going value, if it is to be considered at all. But he has not criticized the Commission for its permission to the railways to pay off bonds and to buy new property with the earnings from the railroads. Otherwise, his treatment of the rate base seems adequate, but he has given practically no consideration to the topic of the rate of return. Since the Supreme Court has allowed the railways a rate of return around six per cent and has permitted other public utilities a rate of return as high as eight per cent, after deductions for the payment of taxes, depreciation, and all other operating expenses, it would seem as though the rate of return to the railroads permitted by the Supreme Court was worthy of some discussion.

Likewise, it seems to the reviewer that Mr. Sharfman should have given more consideration to other ways of solving the problem of social control of the railways and other public utilities. The United States is now faced with the problem of whether or not the regulation of the railways and other public utilities can be made a success. There are apparently five possible ways of solving this problem: (1) by *laissez-faire*, (2) by the enforcement of competition, (3) by government regulation according to the law of public utilities,

(4) by government ownership either with government operation or with private operation, and (5) by the Public Utility Trust of Great Britain. With the doubts as to the success of governmental regulation, it seems that a discussion of these other methods of meeting the problem ought at least to come in for consideration. Yet, this book makes no comparative study of these various methods. All that it undertakes to do is to give an exhaustive study of governmental regulation as an isolated method. Even in connection with this study there are some topics not discussed, which it seems to the reviewer were worthy of discussion.

Yet it may well be that a law teacher is overemphasizing some points which perhaps should not be treated fully in a work such as Mr. Sharfman has undertaken to give us. There is so much of interest and value in this Volume III-B, as well as the volumes preceding it, that one perhaps should hesitate to criticize Mr. Sharfman's work for any omissions which might occur to the reviewer.

Hugh E. Willis.†

FEE CONTRACTS OF LAWYERS. By Earl W. Wood. Prentice-Hall, Inc., New York, 1936. Pp. xv, 432. Price: \$6.50.

The preface of this volume carefully defines its scope by saying that it "is concisely realistic. Its use by the alert lawyer will increase his fees and create a better satisfied clientele. Its use by the courts will contribute valuable assistance in determining the reasonable value of legal services. Its perusal by the law student will provide him with a better foundation for the practice of law." The writer seems to be entirely convinced of the validity of these claims, but it may be remarked that it is no small ambition to increase the fees of lawyers, assist the courts in their problems, and assist the law student in his studies. But this preface at least shows what is clear from a reading of the volume, that it is not intended as a learned disquisition on a branch of contract law, but rather as a practical aid with respect to contracts by lawyers for fees. The difficulty that the writer encounters in handling this topic is that according to his experience it is quite exceptional—indeed almost only in the case of contingent fees—that in practice a lawyer does make a fee contract with his client. Further, with perhaps eastern conservatism, the present writer respectfully doubts whether the eastern practice above referred to is not wiser, *i. e.* whether both the community and the bar are not better off if the contract between the lawyer and his client is not left open for adjustment as the case proceeds, rather than to attempt to determine it in advance by a definite agreement. If, however, a lawyer and his client do desire to make such a contract (and it has been admitted above that such is necessary in the case of contingent fees), it must be conceded that there are a good deal of valuable practical suggestions in the volume that may be usefully considered in connection with the drafting of such agreements. Useful also to the courts, may be the references to the different cases in which courts have had to pass on lawyers' fees, particularly in connection with reorganizations taking place under Section 77B of the Federal Bankruptcy Law. Possibly the forms of fee contracts included in Chapter 13 may be suggestive to those interested in drawing such contracts.

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FEDERAL INCOME TAX HANDBOOK 1935-36. By Robert H. Montgomery. The Ronald Press Company, New York, 1935. Pp. xix, 1034. Price: \$10.00.

FEDERAL TAXES ON ESTATES, TRUSTS AND GIFTS 1935-36. By Robert H. Montgomery and Roswell Magill. The Ronald Press Company, New York, 1935. Pp. x, 458. Price: \$5.00.

The Montgomery Federal Tax Manuals have for years been familiar to taxpayers, lawyers, and accountants. Their combination of statute, regulation, administrative ruling, and judicial decision offers convenience which is greatly appreciated. The sometimes peppery quality of their comment is anticipated with a good deal of pleasure. Separation of the volume dealing with Federal Taxes on Estates, Trusts and Gifts from the Federal Income Tax Handbook¹ is more a change in binding method than a change in substance or method of presentation.² Colonel Montgomery's most comparable competitor, Dr. Klein,³ has ceased to publish annual supplements. Messrs. Paul and Mertens,⁴ to be sure, have issued their massive and highly meritorious work on the Federal Income Tax. But the difference between six volumes and one is pretty obvious from the point of view of the biceps, if not from that of the pocket-nerve.⁵ The elaborate loose-leaf tax services are even more plainly distinguishable. Hence the Colonel has the field largely to himself so far as quick and ready reference is concerned.

Under such circumstances, a reviewer is tempted to deem thorough perusal a work of supererogation, and think it sufficient to skim some pages at beginning, middle, and end, examine the handling of a few recently agitated problems, and call it a day on the strength of rather obvious comment. In truth and in fact no serious book about federal taxation should be so treated as we move toward the end of our seventh uneasy depression year. Full reading is called for—but not with an eye to picking out a miscitation here, an error of wording there, and an obscure sentence in some third place. Of course this can be done,⁶ and of course it casts no substantial reflection upon Colonel Montgomery, Professor Magill, or the others who have worked with them. Such pecking at petty detail is unserviceable. The reviewer should be after big game, not field mice.

And there is big game—huge game—afoot. That great corporation, the United States of America, has slid downhill into what some of its stockholders regard as a desperate position, and what we ought all to regard as a very seri-

1. This latter also covers certain miscellaneous taxes, namely (1) capital stock and excess profits taxes, (2) tax upon transfers to avoid income tax, and (3) taxes on dues and initiation fees.

2. For the sake of brevity, subsequent footnotes refer to the volumes as "Estate Manual" and "Income Tax Manual" respectively. These abbreviated titles are not exact. The "Estate Manual" covers income taxes on estates and trusts and also gift taxes.

3. FEDERAL INCOME TAXATION (1929). The last cumulative supplement was published in 1933.

4. LAW OF FEDERAL INCOME TAXATION (1935).

5. While the original cost of Paul and Mertens (\$60.00) is of course much higher than Montgomery [INCOME TAX MANUAL (1935-1936) \$10.00], use of periodical supplements by the former, contrasted with the latter's new editions, tends to equalize long-term expense.

6. For example: ESTATE MANUAL at 44, puts *Irwin v. Gavit* in 286 U. S. instead of 268 U. S.; INCOME TAX MANUAL at 214, near foot, speaks of "inter-family gifts" when "intra-family" is meant; *id.* at 279, first quoted ruling, words "vendor" and "vendee" transposed in original (*cf.* 281, near foot) and the error is not pointed out; *id.* at 353, quotation from law, "property" in last line should be "properly"; ESTATE MANUAL at 205, contains a very difficult abstract sentence describing the principle of *Rolfe v. Commissioner*, when a few actual or hypothetical specific figures would make the matter easily intelligible. In ESTATE MANUAL at 286-287, the comparative calculations of estate tax and gift tax are not accurate, because of failure to make any allowance for difference in times of payment. *Cf. id.* at 292, where the authors show appreciation of a similar factor.

ous one. The nation has in three years or so traded a supposedly overwhelming burden of private debt for a colossal burden of governmental debt, much of it state and local, but yet to a very great extent federal. It is a bad thing for states and municipalities to wallow in red ink. However, they can only go broke; under our constitution they cannot debase the currency. An indebted national government *can* commit this crime against common welfare. Some have done so in the last fifteen or twenty years with appalling results. And, as the mordant comment runs, the only lesson history teaches is that nobody ever learns the lesson of history. Despite these ghastly recent examples, certain highly vocal politicians are clamoring for further currency debasement in the United States.

The alternative, of course, is carefully measured expenditure paired with far more rigorous taxation than we have yet experienced. There is a popular *cliché*—not always, one may suspect, entirely sound—that it is bad politics to be common-sensible about burdensome taxes in an election year. Since most of the present officers and directors of our federal political corporation believe in *clichés* and are intensely anxious to hold their jobs, they will until after election try to muffle forthspeaking men like Senator LaFollette and hoodwink the multitudinous moderate taxpayers about their doleful prospects. But with the opening of 1937, we must choose between the greased primrose slide to financial Avernus and the hard uphill pull to solvency. If the former be longer pursued, *cadit quaestio*. If we bend legs and backs to the latter, every strap and buckle of the federal tax harness will have its supreme test.

Colonel Montgomery's manuals are perhaps more convenient than any other books in common circulation for swiftly surveying those parts of the internal revenue system likely to be most perilously strained when taxes really begin to tug. Take, first, the law as it stands in the statutes, regulations, and court reports. These disclose concepts and methods which within less than twenty-five years, and mostly by rather brief periods of hot-house treatment, have been carried from the hobbledehoy efforts of inexperienced draftsmen to highly sophisticated and elaborate maturity. Fiscal demands of the greatest war and the most deadening depression in modern history have tempted taxpayers' counsel to intricate ingenuity. This guile the government has met partly by brute force, partly by counter-guile. On the whole, tax avoidance and minimization to any undesirable degree have in theory become very difficult. At some points, brute force gives the suggestion of degenerating into *brutum fulmen*. One doubts, for instance, how effectively gifts of foreign realty by citizens or resident aliens can be checked up and taxed,⁷ and how far it will be practicable to pursue in actuality some Congressional and Treasury notions of indirect gifts.⁸ Also the almost hysterical vehemence of certain features of the surtax upon undistributed corporate profits,⁹ rouses doubt respecting the Treasury's ability to apply this levy with comprehensive fairness. As these words are written, some Jerry-built substitute for much of or the whole pre-existing corporate tax scheme is being knocked together, but the effectiveness and expediency of the new plan, and indeed the chances of jamming it through Congress, are highly problematical. Then too, comprehensive rounding out of certain concepts has

7. *Id.* at 278-279.

8. *Id.* at 290 *et seq.* And see BREWSTER, IVINS AND PHILLIPS, *THE FEDERAL GIFT TAX* (1933) §§ 14 *et seq.*

9. *INCOME TAX MANUAL* at 635 *et seq.* The features referred to involve the risk of double surtax (first on corporation, later on dividend recipients) and especially the savage composite maximum rates on incomes of personal holding companies; the involved problems of percentages and relationships in such concerns; the effort to cover foreign corporations coupled with the possible futility of the tax if they are not covered; and inclusion of some corporate groups seemingly innocent of the great transgression of trying to postpone individual surtax.

been delayed because their consideration cross-cuts earlier and more familiar currents of thought. Thus Colonel Montgomery's index refers to five pages on which the effects of state laws upon federal taxes are discussed.¹⁰ Not over-meticulous perusal of the text discloses many other intrusions of this or related problems.¹¹ While some fairly broad guiding principles have been enunciated about the matter from time to time, the full task of harmonizing or otherwise dealing with all the rulings, regulations, and decisions remains to be done. But it is probably more typical nowadays to find the Treasury and the courts pushing old principles intelligently and enthusiastically beyond the bare denotation of the acts. A striking illustration of this appears in the recent holdings that settlors of irrevocable trusts for spouses or children remain taxable with respect to the trust income.¹² Federal taxes are taking on an appearance much like that of Browning's "great text in Galatians."

This, however, is tax law in governmental plan and hope. Such planning may go awry, such hopes be disappointed. Men fail, and men overthrow, the letter of some laws as well as the spirit. We know what has happened to Section 2 of the Fourteenth Amendment, to the Fifteenth Amendment, and to the Eighteenth. In particular we know that the last fell because of uncontrolled and very likely uncontrollable bootlegging. Even with conscientious and skilled administration, any tax is subject to the equivalent of bootlegging except, possibly, a tax upon land and buildings. This, of course, is precisely the kind of tax unavailable to our federal government, so long as the apportionment clauses stand. Death taxes and income taxes must depend largely upon self-assessment, which opens the maximum opportunity for fiscal bootlegging. Is there evidence of a real risk that evasion of federal taxes may get out of control?

Colonel Montgomery's main preface¹³ seems to give the question a startlingly vigorous affirmative. An early passage¹⁴ summarizes matters thus: "Our federal income tax law is grossly unfair; it violates the fundamental principles of scientific taxation; it taxes gross income and capital as well as net income; parts of it are unconstitutional; it is permeated with soak-the-rich stuff which is out of place in a tax law; it is harshly administered." A sweeping condemnation, indeed, but its wording is mild compared to that of some of the accompanying specifications. Let us not split hairs over the propriety of such expressions in a book primarily intended as a helpful and therefore dispassionate exposition of a complex revenue device. If any substantial body of opinion chimes in with Colonel Montgomery, the Bureau of Internal Revenue is sailing a perilous course.

Quite extended talk with tax practitioners and taxpayers in New England and New York has convinced the present reviewer that the northeastern corner of the country contains many intelligent and normally fair-minded men and women who feel bitter resentment toward federal revenue practices. Their criticism is based principally on what they deem unworthy methods of administration. Scattering inquiry reveals some tendency toward such feeling at least as far south as Philadelphia and as far west as Chicago. In the true west and the south, however, superficial questioning has disclosed a tolerant or even an approving attitude about the operations of the Bureau. For obvious reasons it

10. *Id.* at 49, 50, 229, 430, 662.

11. *Id.* 46, 266, 290, 303, 326, 338-339, 407, 431, 436, 455, 529, 540. See also *ESTATE MANUAL* at 9, 25, 210.

12. *Id.* at 77-78 and 295, and the subsequent line of decisions beginning with *Douglas v. Willcuts*, 296 U. S. 1 (1935). *Shanley v. Bowers*, 81 F. (2d) 13 (C. C. A. 2d, 1936), suggests some limits to this principle.

13. *INCOME TAX MANUAL* at iii-ix. *Cf. id.* at 383-384, 479, 675, 678-679, 752, 806, 849-850. While some critical expressions in the text mince no words, they rarely approach the tone of the preface.

14. *Id.* at iii.

would not be surprising if really careful investigation established this geographical shading of sentiment. Federal exactions are now so largely based upon ability to pay or even upon theories of breaking down or "redistributing" accumulated wealth, as contrasted with the older *quid pro quo* notion, that they tend to be most resented in localities where big business centers and large aggregations of active capital are found.

The Treasury on its side asserts that in these very regions have been exerted the most extreme and sometimes improper efforts to circumvent federal taxation. Far from playing the part of bullies, the contention goes on, United States officials are merely exercising justifiable firmness. The primary impelling force is taxpayers' evasiveness, which has whipped Congress into whipping up the Bureau.

Now in a deeply fundamental sense this dispute presents a lawyers' problem. The lawyer is or should be a minister of good government and that concept of his place in society involves great responsibility for the attitude of his clients. "It is sad," says Colonel Montgomery, "but true that today every taxpayer with a decent income should consult a tax practitioner."¹⁵ Such a practitioner should have and firmly express his own mind about when to play the acquiescent citizen and when and how to play John Hampden. But it is hard indeed to be of a mind at once fair and firm as to a complex condition confused by charge and countercharge, rumor and counter-rumor. No mean service might be rendered the community by thorough, disinterested inquiry into, followed by a really accurate report upon, the conditions creating friction between government and taxpayer. It is exceedingly difficult to lay out a method for such inquiry. Yet experience teaches that alleviation of the trouble will be hard at best, and certainly no wise step is possible until causes are fully disclosed and justly appraised.

J. M. Maguire.†

15. *Id.* at viii.

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BOOK NOTES

THE ART OF CROSS-EXAMINATION (Fourth edition). By Francis L. Wellman. The Macmillan Co., New York, 1936. Pp. xvi, 479. Price: \$5.00.

One of the most desirable accomplishments of the trial practitioner is a facile ability to cross-examine intelligently. Unfortunately it is an ability which is not stressed by our present method of legal education. As a result it is acquired, if at all, by the painful method of experience. Mr. Wellman's book does not purport to be a complete guide to the easy acquisition of the ability but it is of value to the young lawyer in that it points out some of the more serious pitfalls and outlines means by which they may be avoided. The author is blessed with a pleasant conversational style and has interspersed his description of the technique of the cross-examiner with a number of interesting legal anecdotes which make the book pleasant reading, not only for the lawyer but also for the layman. The fourth edition has several new features. Mr. Wellman not only gives his reader the benefit of his own extensive trial experience but has included two new chapters, one written by Mr. Max Steuer, the other by Mr. E. R. Buckner, both prominent members of the New York Bar. About one-half of the volume deals with a discussion of the problems presented by cross-examination. The second half is a collection of actual cross-examinations in outstanding cases. Among the new reports added to this edition are the cross-examination of Mrs. Vanderbilt in her unsuccessful attempt to regain the custody of her child and the cross-examination of Rhinelander in his divorce action against his colored wife. The inclusion of the reports presents to the reader an opportunity to observe in practice the rules which the author discusses in the first part of his book. Some criticism might be directed against the editing of some of the reports and the selection of others but on the whole those included are well suited both to hold the reader's interest and to illustrate the technique of the skilled examiner.

J. E. B.

SOCIAL SECURITY IN THE UNITED STATES. By Paul H. Douglas. Whittlesey House, New York, 1936. Pp. xi, 384. Price: \$3.00.

TOWARD SOCIAL SECURITY. By Eveline M. Burns. Whittlesey House, New York, 1936. Pp. ix, 269. Price: \$2.00.

Professor Douglas' admirable book contains a subtitle misleading in its modesty—"An Analysis and Appraisal of the Federal Social Security Act." Roughly, only one-third of the text is devoted to an exposition of the provisions of the statute. This treatment is preceded by a lucid discussion of the development in this country of the movement for social security by governmental intervention, and of the legislative history of the Act. The concluding third of the text is entitled "What Lies Before Us", and includes the author's suggestions for desirable future developments. Miss Burns' smaller volume is less ambitious and correspondingly less of a contribution. It purports "to explain what the Social Security Act means to the ordinary man or woman," thereby disarming in advance any critic, legalistic or otherwise, who desires a less elementary study. Nevertheless, the descriptions of the provisions and probable operations of the Act are closely knit, and are treated in relation to the conflicting philosophies of governmental participation.

While both Professor Douglas and Miss Burns welcome the Act as at least a start in a field in which, as compared with certain European nations, the United States has been a considerable laggard, they recognize the seriousness and number of its defects. The Act is to be viewed from three angles: first, its indirect effect on the national economy; second, the adequacy of its administrative set-up; third, the extent of its contribution toward the purpose indicated by its title. The first aspect is highly speculative, and includes the advantages or disadvantages to be expected from payroll taxes which may, or may not, be passed on to the consumer, and the effect of setting up necessarily large reserves. The second demonstrates the inevitable deficiencies arising from interlocking state and federal interests and the clumsy features of a tax-offset system. As to the third, it must be realized that the Act is only an extremely modest gesture. While even so much may horrify those who consider government's true realm to be limited to police and fire service, schools of thought which believe government properly to be concerned with the welfare of its citizens will not rest content with what has already been accomplished.

Both books contain a discussion of constitutionality, but only Professor Douglas' will be of interest to a lawyer. Unfortunately, the author is weakest in this chapter. He misunderstands *Massachusetts v. Mellon*¹ and is puzzled that the Supreme Court should have said it was not passing on the constitutionality of the Maternity Act when, to his mind, it had been discussing exactly that. His treatment of the *Second Child Labor Tax* case² as compared to the *Oleomargarine* case³ is anything but acute.

Attack along constitutional lines will come from two directions. The federal spending power will be challenged, no doubt along the lines of the recent AAA case.⁴ Unfortunately, that opinion is so obscure that it furnishes only the slightest basis for prediction. The pooling provisions of the implementary state legislation will be attacked under due process. As to these, there exists the familiar situation of at least two lines of authority, equally applicable and equally valid as theoretical constitutional law, but leading to exactly opposite results.

J. F.

GUINEA PIGS NO MORE. By J. B. Matthews. Covici, Friede, New York, 1936. Pp. 311. Price: \$2.00.

To the many readers of *100,000,000 Guinea Pigs*, the name *Guinea Pigs No More* would seem to convey the thought that the American people have already cast from themselves the yoke of acting as specimens for all sorts of industrial, profit-seeking experimentation. However, the material contained in this book rather indicates that there are now over 120,000,000 guinea pigs, subjected to even worse exploitation. There is a monotonous repetition of the various types of misleading advertising, adulteration of food and medicinal products, high pressure sales activity, and useless gadgetry. In this respect the book is not unlike its many predecessors. It is equally as optimistic as the others in that it foresees that the adoption of the suggested plan will assure much desired reform. But in one particular the book goes further, and this feature is one that should interest the legal profession generally. That is the appendix by Oscar S. Cox, a member of the New York Bar, which consists of

1. 262 U. S. 447 (1923).

2. *Bailey v. Drexel Furniture Co.*, 259 U. S. 20 (1922).

3. *McCray v. United States*, 195 U. S. 27 (1904).

4. *United States v. Butler*, 56 Sup. Ct. 312 (1936), 84 U. OF PA. L. REV. 547.

a draft of a proposed act to establish a Federal Department of the Consumer, similar to the other departments under cabinet officers. This act embodies a concrete plan incorporating most of the suggestions contained in the book, and bases the whole structure upon this consolidated federal agency which should replace all the unorganized public and semi-public groups. Rather severe sanctions are included to make the act effective. Constitutional difficulties are met by linking the subject-matter to interstate commerce and use of the radio and postal systems. The provisions are very detailed, including even the salaries and number of employees needed.

The fate of this suggestion will probably be similar to the various schemes previously proposed. But it is at least pleasing to note that the crusaders are coming around to a solution which will be operative under our system of government, so that when the consumer group is sufficiently educated there will be an opportunity for effective action.

Louis J. Goffman.[†]

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BOOKS RECEIVED

- ADMINISTRATIVE LABOR LEGISLATION. By John B. Andrews. Harper & Bros., New York, 1936. Pp. 231. Price: \$2.50.
- AMERICAN FAMILY LAWS (Volume IV). By Chester G. Vernier. Stanford University Press, Stanford University, 1936. Pp. xxi, 496. Price: \$5.00.
- AMERICAN LABOR STRUGGLES. By Samuel Yellen. Harcourt, Brace & Co., New York, 1936. Pp. xviii, 398. Price: \$3.50.
- THE ART OF CROSS-EXAMINATION (4th edition). By Francis L. Wellman. The Macmillan Co., New York, 1936. Pp. xvi, 479. Price: \$5.00.
- BUSINESS AND GOVERNMENT (2d edition). By Charles C. Rohlfsing, Edward W. Carter, Bradford W. West, John G. Hervey. Foundation Press, Inc., 1935. Pp. xv, 605.
- CONGRESS OR THE SUPREME COURT. By Egbert R. Nichols. Noble & Noble, Inc., New York, 1936. Pp. iv, 476. Price: \$2.00.
- CONSTITUTIONAL LAW. By Hugh E. Willis. The Principia Press, Bloomington, 1936. Pp. viii, 1198. Price: \$10.00.
- CRIME AND JUSTICE. By Sheldon Glueck. Little, Brown & Co., Boston, 1936. Pp. viii, 349. Price: \$3.00.
- FEDERAL REVENUE LAWS. Commerce Clearing House, Inc., Chicago, 1936. Pp. 287. Price: \$1.00.
- FEE CONTRACTS OF LAWYERS. By Earl Wood. Prentice-Hall, Inc., New York, 1936. Pp. xv, 432. Price: \$6.50.
- GUINEA PIGS NO MORE. By J. B. Matthews. Covici, Friede, New York, 1936. Pp. 311. Price: \$2.00.
- HISTORY OF LABOR IN THE UNITED STATES (Volume III). By Don D. Lescohier and Elizabeth Brandeis. The Macmillan Co., New York, 1936. Pp. xxx, 778. Price: \$4.00.
- HISTORY OF LABOR IN THE UNITED STATES (Volume IV). By Selig Perlman and Philip Taft. The Macmillan Co., New York, 1936. Pp. viii, 683. Price: \$4.00.
- INVENTION AND THE LAW. By Harry Aubrey Toulmin, Jr. Prentice-Hall, Inc., New York, 1936. Pp. xx, 399. Price: \$5.00.
- THE LAW OF CADAVERS. By Percival E. Jackson. Prentice-Hall, Inc., New York, 1936. Pp. lxxv, 734. Price: \$7.50.
- LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS. By Charles O. Gregory. University of Chicago Press, Chicago, 1936. Pp. xiii, 200. Price: \$2.00.
- LIBERALISM FIGHTS ON. By Ogden L. Mills. The Macmillan Co., New York, 1936. Pp. 160. Price: \$1.50.
- LOCAL DEMOCRACY AND CRIME CONTROL. By A. C. Millspaugh. The Brookings Institution, Washington, 1936. Pp. xii, 263. Price: \$2.00.
- NATIONAL ECONOMIC SECURITY. By Arthur B. Adams. University of Oklahoma Press, Norman, 1936. Pp. 328. Price: \$2.50.

- NEUTRALITY. Volume One (1935): The Origins. By Philip C. Jessup and Philip Deák. Pp. xiv, 294. Price: \$3.75. Volume Two (1936): The Napoleonic Period. By W. Alison Phillips and Arthur H. Reede. Pp. ix, 338. Price: \$3.75. Volume Three (1936): The World War Period. By Edgar Turlington. Pp. xi, 267. Price: \$3.75. Volume Four (1936): Today and Tomorrow. By Philip C. Jessup. Pp. vii, 237. Price: \$2.75. Columbia University Press, New York, 1936.
- THE NATURE OF DIVIDENDS. By Gabriel A. D. Preinreich. Published by the author, New York, 1935. Pp. xii, 226. Price: \$2.50.
- NEW BANKRUPTCY HANDBOOK. By M. S. Carmichael, Walter J. Knabe, and J. C. Fleming. Kreider-Thompson & Co., Montgomery, 1935. Pp. viii, 439. Price: \$5.00.
- PUBLIC UTILITY REGULATION AND THE SO-CALLED SLIDING SCALE. By Irving Bussing. Columbia University Press, New York, 1936. Pp. 174. Price: \$2.75.
- A REAL NEW DEAL. By Charles E. Carpenter. Published by the author, Los Angeles, 1936. Pp. 137.
- THE REGULATION OF COMPETITION. By Nelson B. Gaskill. Harper & Bros., New York, 1936. Pp. x, 179. Price: \$3.50.
- SALES TAX LAWS. Commerce Clearing House, Inc., Chicago, 1936. Pp. 304. Price: \$1.00.
- SOCIAL SECURITY IN THE UNITED STATES. By Paul H. Douglas. Whittlesey House, New York, 1936. Pp. xi, 384. Price: \$3.00.
- TOWARD SOCIAL SECURITY. By Eveline M. Burns. Whittlesey House, New York, 1936. Pp. ix, 269. Price: \$2.00.
- TRIAL TECHNIQUE. By Irving Goldstein. Callaghan & Co., Chicago, 1935. Pp. xxvii, 790. Price: \$10.00.
- UNITED STATES MASTER TAX GUIDE 1936. Commerce Clearing House, Inc., Chicago, 1936. Pp. 287. Price: \$1.00.
- WALTER LIPPMAN'S INTERPRETATIONS 1933-1935. Edited by Allan Nevins. The Macmillan Co., New York, 1936. Pp. x, 385. Price: \$2.50.
- WINSLOW'S MINIMIZING DEATH TAXES (1935-1936 edition). By C. Morton Winslow. Commerce Clearing House, Inc., Chicago, 1936. Pp. 116. Price: \$1.00.
- YOUR SECURITIES AND FEDERAL TAXES. By Julius Sinker. Commerce Clearing House, Inc., Chicago, 1936. Pp. 112. Price: \$1.00.